JD–127–97
Jackson, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONSUMERS ENERGY COMPANY

and Case 7--CA--37934

VINCENT F. GULLI, An Individual

MICHIGAN STATE UTILITY WORKERS COUNCIL, AFL-CIO

and Case 7--CB--10768

VINCENT F. GULLI, An Individual

Dwight Kirksey, Esq.,
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M. M. Nestor, Esq., Jackson, MI,
for the Respondent-Company.
George Kruszewski, Esq.,
Detroit, MI, for the Respondent-Union.

DECISION

Statement of the Case

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on December 1, 1995, by Vincent F. Gulli, an individual, against Consumers Energy Company and Michigan State Utility Workers Council, AFL-CIO, herein called, respectively, Respondent-Company and Respondent-Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a Consolidated Complaint dated January 30, 1996, alleging violations by Respondents of Sections 8(a)(3) and (1), 8(b)(2) and 1(A) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondents, by their Answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Detroit, Michigan, on March 5, 1997, at which the General Counsel and the Respondents were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Thereafter, the Company and the Union filed briefs which have been duly considered.

Upon the entire record in these cases, and from my observations of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent-Company, a corporation, has an office and place of business in Jackson, Michigan, and is engaged as a public utility in the storage, sale and distribution of natural gas and related products. During the year ending December 31, 1995, a representative period, the Company had gross revenues in excess of $250,000, and purchased and received, in Michigan, goods and materials valued in excess of $50,000, which were sent directly from points located outside the State of Michigan. I find that Consumers Energy Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organizations

Respondent-Union, and Utility Workers Union of America, AFL-CIO, are, each, labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Background

The Michigan State Utility Workers Council, an intermediate entity, is the governing body for the 23 separate Michigan based local unions which comprise it, and represents employees of Respondent-Company and of Midland Cogeneration Venture. The Council has represented Consumers Energy Company's operating, maintenance and construction employees since the mid 1940s.

Consumers has maintained a non-contributory retirement or pension plan since 1944, covering all of its full-time employees, including those represented by the Council. Although the successive collective-bargaining agreements between the Company and the Union refer to the pension plan, the plan itself, and negotiated changes, have been separately set forth in a stand-alone pension plan booklet.

The Council is governed by the 69 delegates sent from its 23 constituent locals. Between meetings of the delegates, its affairs are run by an executive board consisting of four part-time vice-presidents and three full-time officers--the president, secretary-treasurer and executive vice-president. While the part-time vice-presidents, throughout their terms in office, are, and remain, employees of Consumers, the full-time officers must take a leave of absence from the Company and they receive compensation, solely, from the Union. However, those officers are not covered by a Council pension plan and, instead, they continue coverage under the Company plan.

In the instant case, the General Counsel contends that Respondents violated the Act when, in September, 1995, they agreed to an amendment to the pension plan, which they have thereafter maintained, under which the earnings credited for pension benefits to full-time officers of Respondent-Union exceed the earnings which can be credited for such benefits to any employee employed by Respondent-Company, and represented by Respondent-Union, who is not on authorized leave-of-absence to serve as an officer of Respondent-Union. Respondents urge that, even with the negotiated change, full-time officers of the Union are at a disadvantage, vis-a-vis members of the bargaining unit who are not full-time officers, regarding retirement benefits and, accordingly, the negotiated amendment to the pension plan does not tend to encourage, by grant of an employment benefit, the holding of office in the Union, in contravention of statutory provisions.

B. Facts

The facts in this case are not in dispute and may be summarized, as follows:

The minimum retirement age under the Consumers pension plan is 55, and at least 5 years of service, preceding retirement, are required. Benefits are calculated by multiplying the average of an employee's highest 5 years of earnings ("high 5") by 2.1 percent for each work year up to 20 years, and by 1.5 per cent for each of the next 15 years of work.

Prior to 1983, those employees who also served as full-time union officers risked disadvantage at retirement since, for their years on leave of absence, to hold union office, they received no earnings from Consumers credited for pension benefits. If the leave of absence occurred in the years preceding retirement, then, earlier years, when contractual wages were less, were relied on to determine the "high 5" utilized for the pension benefits calculation. To meet the potential problem, Respondents, in the 1983, contract negotiations, agreed to amend the pension plan to provide that an individual on authorized leave, to serve as president of the Council, would be credited, for pension plan purposes, with service time and with earnings at 15 percent more than the standard rate for Labor Grade 14 for each year of such leave. The other full-time officers were to be credited with service time and earnings at 10 percent above the Labor Grade 14 rate. Under the amendment, amounts so credited could not exceed the standard rate for Labor Grade 19, the highest labor grade at the time.

The above referenced provision was not altered in the course of contract negotiations which occurred in 1986, 1989 and 1992. In the 1992, negotiations, the Union did propose, and the Company did agree, to include bargaining unit members in Consumers' savings and investment plan, a 401(k) plan previously maintained, only, for salaried and other non-bargaining unit personnel. The Union also sought to include full-time Council officers under the plan but the Company refused, saying it would be unlawful to do so. Accordingly, the three full-time Council officers were not brought under this plan and they, unlike participants in the savings and investment plan, have no pre-tax basis available to set aside money for retirement purposes.

Under the 401(k) plan, employees can contribute up to 12 percent of their wages on a tax-deferred basis. They can contribute another 4 percent, after taxes. Consumers makes matching contributions of at least 50 percent, and up to 100 percent, of the first 6 percent of employee wages contributed, depending upon the degree of the Company's attainment of earnings goals.

During contract negotiations in 1995, Respondent-Union proposed numerous changes in employee retirement benefits, including one to revise the formula for crediting earnings, under the pension plan, to full-time Council officers. In resisting most of the various proposals of the Council, Respondent-Company argued that the existing retirement provisions were generous when looked at as a whole, that is, including pension, 401(k) and social security. However, it agreed to the pension plan formula change for union officers after the Union argued that such was necessary in order to eliminate a portion of the disadvantage to those officers resulting from the fact that they cannot participate in the savings and investment, or 401(k), plan. Under the new provision, the president of the council is credited with earnings, for pension plan purposes, at 15 percent more than the standard rate for Labor Grade 20, the highest labor grade under the collective-bargaining agreement. Up to three other employees on leave of absence to serve as full-time officers of the council are so credited with earnings at 15 percent more than the standard rate for Labor Grade 18. Unlike the 1983, provision, for

crediting earnings to these officers, the 1995, agreement, contains no cap on the amount of earnings which can be credited.[1]

There is considerable record evidence that the change to the pension plan negotiated in 1995, did not put the Council's full-time officers in a better overall financial position with respect to retirement than other bargaining unit employees because of the officers' inability to participate in the savings and investment plan. While comparisons are, necessarily, speculative, and dependent, inter alia, upon the amounts contributed to the 401(k) plan and the return achieved on that account, the financial projections as contained in this record show, generally, that a non-officer in Labor Grade 20 who retires after having participated fully in the savings and investment plan, and having realized the tax advantages of such participation, will, overall, have available a greater monthly income than retirees who have served one or more terms as full-time union officers and were, for the periods of such service, unable to participate in the 401(k) plan. This is so, even allowing for an increased "high 5," for pension plan purposes, achieved by virtue of the 1995, agreement.

C. Conclusions

In Electrical Workers IBEW Local 1212 (WPIX, Inc.),[2] the Board held that, henceforth, in deciding whether a particular collective-bargaining provision that makes some distinction among employees on the basis of union status or activity violates Section 8(b)(1)(A) and (2) of the Act, it would apply the following three-step analysis:

> . . . First we look to see whether the provision treats employees differently on the basis of union status or activity. Next we look at whether this distinction tends to encourage the union status or activity in question. If the answer to either of these first two questions is no, then we need not reach the third step. If the answer to both is yes, then we determine whether the disparate treatment that tends to encourage or discourage union activity is justified by policies of the Act. [footnote omitted]

Applying that test to the facts in the instant case, the 1995, amendment, to the pension plan clearly treats employees differently on the basis of union status or activity. Full-time union officers, only, are credited, for pension purposes, with earnings up to 15 percent above the

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[1] Specifically, the negotiated amendment to the pension plan, under attack, here, by the General Counsel, provides:

> Earnings of Officers of Michigan State Utility Worker's Council-Effective for Officers in Office on or after September 1, 1995. An employee on authorized leave of absence to serve as president of the Michigan State Utility Worker's Council will be credited with Earnings at 15% more than the Standard Rate for Labor Grade 20 or equivalent including cost of living allowances, for the duration of such leave of absence to serve as president; and up to three other such employees on authorized leave of absence to serve as other officers of the Michigan State Utility Worker's Council will be credited with Earnings at 15% more than the Standard Rate for Labor Grade 18 or equivalent including cost of living allowances, for the duration of their leaves of absence to serve as officers, except that such amounts will not be less than the Standard Rate for the job from which such an employee received an authorized leave of absence, including cost of living allowances.

[2] 288 NLRB 374 (1988), enfd. sub nom WPIX, Inc. v. NLRB, 870 F. 2d 858 (2 Cir., 1989).

standard rate for Labor Grade 20, the highest labor grade as set forth in the collective-bargaining agreement. Thus, the answer to the first question, under the WPIX test, is yes. However, in this case, as in WPIX itself, the answer to the second question is no, as the distinction does not tend to encourage employees to become active unionists, or to seek selection or election to temporary union jobs, but, rather, removes, in part, a condition that would discourage employees from taking such jobs. Thus, in fashioning the 1995, amendment, the parties sought partially to alleviate the potential retirement losses suffered by full-time officers because they are not eligible to participate in the 401 (k) plan, a severe disincentive to serve in a temporary union job. Further, the record evidence shows, even after the negotiated change, full-time officers were not necessarily placed in a better position with respect to retirement benefits than the remainder of the bargaining unit and, more likely, they remained in a worse position. This is so as any potential gains in pension plan benefits from the formula change are apt to be more than offset by losses from the inability to participate in the savings and investment plan. Thus, the 1995, amendment, to the pension plan, when viewed in conjunction with all existing retirement provisions, would not tend to encourage employees to take temporary union jobs in order to gain an employment benefit. Instead, there remains a disincentive to do so. Also, as in WPIX, employees who do not take full-time union office, but remain on the job with Respondent-Employer, are not disadvantaged due to the pension plan amendment. They remain in the same situation, and will receive the same retirement benefits, as before.[3]

As the record evidence demonstrates that the pension plan, as amended, confers upon a full-time union officer a new benefit which is speculative if, indeed, the officer realizes any benefit at all, and which is insufficient entirely to overcome the disincentive to hold office due to lost opportunities to participate in the 401(k) plan, it cannot be said to accord an unlawful preference to employees serving as union officials. Accordingly, by negotiating and maintaining the 1995, amendment, to the plan, Respondents have not violated the Act.

Conclusions of Law

1. Consumers Energy Company is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. Michigan State Utility Workers Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not violated the Act as alleged in the Complaint.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[4]

ORDER

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[3] Cf. Dairylea Cooperative, Inc., 219 NLRB 656 (1975), enfd. sub nom, NLRB v. Teamsters Local 338, 531 F. 2d 1162 (2 Cir, 1976).

[4] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

The Complaint is dismissed.

Dated, Washington, DC August 1, 1997

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Irwin H. Socoloff
Administrative Law Judge